Supreme Court, U.S.
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No. 95-625

In The

# Supreme Court of the United States

October Term, 1995

IN RE: HOLYWELL CORPORATION and
THEODORE B. GOULD,

*Petitioners,*

On Petition For A Writ Of *Mandamus*
To The United States Court Of Appeals
For The Eleventh Circuit
And To The United States District Court
For The Southern District Of Florida

## BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

VANCE E. SALTER, ESQ.
COLL DAVIDSON CARTER SMITH
SALTER & BARKETT, P.A.
3200 Miami Center
201 South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 373-5200
*Attorneys for The Bank of New York*

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## QUESTION PRESENTED

Whether the extraordinary writ of mandamus is necessary to enforce any alleged non-compliance by the court of appeals, district court, or bankruptcy court with this Court's decision in *Holywell Corp. v. Smith*, 503 U.S. 47 (1992)?

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## STATEMENT OF JURISDICTION

The Petitioners assert that jurisdiction exists under 28 U.S.C. §1651(a).

No jurisdiction exists, however, as the Petitioners have failed to claim or prove the inadequacy of existing remedies – specifically, consolidated appeals initiated by the Petitioners, which are presently pending in the court of appeals. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953).

## STATEMENT OF THE CASE

### Introduction

This case and a companion petition for *certiorari* (Case No. 95-608) are the thirteenth and fourteenth attempts by five debtors in consolidated bankruptcy proceedings – commenced voluntarily by the debtors in 1984 – to delay and disrupt the closing of the cases.[1]

The Petitioners have commenced and prosecuted, unsuccessfully in each instance, over 30

[1] Of the 12 prior petitions to this Court, 11 were denied. The petition in 90-1361 was consolidated with a petition for *certiorari* filed by the Solicitor General (90-1484), and was granted. The Solicitor General's petition involved complex issues regarding federal income tax and bankruptcy law. The Solicitor General prevailed; *Holywell Corp. v. Smith*, 503 U.S. 47 (1992). After remand, the bankruptcy trustee settled the resulting tax liability with the Internal Revenue Service and the settlement was approved by the bankruptcy court.

appeals to the court of appeals, and over 80 appeals in the district court, in the ten years since a creditors' plan of reorganization was confirmed.

The present Petition is also frivolous.[2]

The Petitioners were debtors in five consolidated bankruptcy cases commenced in 1984. In 1985, Respondent, The Bank of New York ("Bank"), filed a plan of reorganization (the "Plan") which was approved by the creditors and confirmed by the bankruptcy court. *In re Holywell Corp.*, 54 B.R. 41 (Bankr. S.D. Fla. 1985). The district court affirmed the confirmation order. *Holywell Corp. v. Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986). The court of appeals held that further appeals were moot, because the Plan had been substantially consummated, and this Court denied *certiorari*. *Miami Center Limited Partnership v. The Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. den.* 488 U.S. 823 (1988). This Court also denied these Petitioners' petition for *mandamus* regarding that decision by the court of appeals.[3]

The bankruptcies involved approximately 400 claims, exceeding $350 million; the Bank's mortgage claim of approximately $240 million predominated. The Plan provided that a Liquidating Trustee (a Respondent here) would liquidate the assets of the

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[2] The Petitioners have been held in contempt repeatedly for attempting to relitigate previously-decided issues, and for attempts to circumvent bankruptcy court rulings. *See, e.g., In Re Holywell Corp.*, 967 F.2d 568 (11th Cir. 1992).

[3] *In re Gould*, 488 U.S. 814 (1988).

debtor/Petitioners to pay allowed claims, and then turn over any residual money or property to the debtors.

After a series of losses in the bankruptcy court, the Petitioners tried to circumvent the Florida bankruptcy court by filing lawsuits against the Bank and the Trustee in Virginia and in the state court in Florida.

The Virginia lawsuit culminated in a summary judgment in favor of the Bank and the Trustee; the bankruptcy court in Florida then imposed some $138,000 in sanctions against the Petitioners and their counsel.[4]

The state court lawsuit in Florida was removed by the Respondents to the Florida bankruptcy court, which promptly dismissed the lawsuit. The Petitioners appealed to the district court (which affirmed[5]) and the court of appeals (which affirmed[6]) and then sought *certiorari* (which was not granted) here; 493 U.S. 1057 (1990).

**The Tax Case**

The prior proceedings in this Court involved the duties of the Liquidating Trustee under the Plan with

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[4] *In re Holywell Corp.*, 967 F.2d 568 (11th Cir. 1992).

[5] *In re Holywell Corp.*, 93 B.R. 780 (S.D. Fla. 1988); Petitioners' App. 11a.

[6] *Miami Center v. Bank of New York*, 881 F.2d 1086 (11th Cir. 1989).

respect to (a) federal income tax returns and (b) the payment of any taxes due according to such returns.

The Trustee filed an action for declaratory judgment in the bankruptcy court seeking to resolve these issues. The bankruptcy court, district court, and court of appeals concluded that the Trustee was not responsible for the filing of any such returns or the payment of any such taxes.[7]

This Court reversed, approving the position of the Solicitor General and Internal Revenue Service ("IRS") that the Trustee and Plan were subject to 26 U.S.C. §6012(b). *Holywell Corp. v. Smith*, 503 U.S. 47 (1992). This Court did not in any way suggest that the confirmation order should be revoked or that the Plan should be rescinded.

On remand, the Trustee and the IRS settled the income tax claims for approximately $13.3 million, and the bankruptcy court approved the settlement. The settlement funds were paid. The Trustee obtained a determination that the Bank, as indemnitor and Plan proponent, was liable to the Trustee for the tax liabilities,[8] and the Trustee and Bank then settled those issues with the approval of the bankruptcy court. The district court affirmed the approval of the settlement when the debtor/Petitioners filed their inevitable appeal.

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[7] *In re Holywell Corp.*, 911 F.2d 1539 (11th Cir. 1990).

[8] *Smith v. Bank of New York*, 161 B.R. 302 (Bankr. S.D. Fla. 1993).

Following this Court's 1992 opinion in the tax case, the debtor/Petitioners also filed claims in the bankruptcy court seeking damages from the Trustee and the Bank regarding the confirmation and administration of the Plan (including the income tax issues). After a trial on the merits in June, 1993, the bankruptcy court ruled in favor of the Trustee and the Bank in all respects; the district court affirmed.[9]

## SUMMARY OF ARGUMENT

*Mandamus* is a drastic and extraordinary remedy used only where there is a "usurpation of judicial power" or a clear abuse of discretion by a lower court; the writ is not a substitute for an appeal.

The Petitioners' claims that the court of appeals and district court misapplied this Court's decision in *Holywell Corp. v. Smith*, 503 U.S. 47 (1992), are premature. The bankruptcy court and district court have approved a settlement of the underlying dispute (the Internal Revenue Service was paid $13.3 million in federal income taxes), but the Petitioners' further appeal to the court of appeals has not been decided.

The Petition is frivolous, and joins eleven other equally frivolous petitions that were previously denied by this Court.

[9] The bankruptcy and district court opinions are unreported; Petitioners' App. 18 and 42, respectively. The debtor/Petitioners' further appeals are now pending in the Eleventh Circuit as Cases 94-4818 and 95-4212.

## ARGUMENT

### *MANDAMUS* IS NEITHER NECESSARY NOR APPROPRIATE

This Court's decision in *Holywell Corp. v. Smith*, 503 U.S. 47 (1992), resolved an open question raised by the Liquidating Trustee in his adversary proceeding for a declaratory judgment: who, as between the Trustee and the debtor/Petitioners, should file tax returns and pay any taxes due?

This Court ruled in favor of the position asserted by the Solicitor General and the IRS. Thereafter, the Trustee and the IRS settled the matter. The Trustee paid the IRS approximately $13.3 million, and then claimed that amount and more from the Bank. The bankruptcy court held that the Bank was liable to the Trustee as an indemnitor and by virtue of the Trustee's reliance on the terms of the confirmed Plan under which he served. *Smith v. Bank of New York*, 161 B.R. 302 (Bankr. S.D. Fla. 1993). The Trustee and the Bank then settled those claims by reducing the indebtedness of the Trustee to the Bank. The bankruptcy court approved the settlement.

There is nothing extraordinary in the events which occurred after this Court's ruling in 1992, or which warrants the drastic remedy of *mandamus*. To the contrary, all of the parties other than the Petitioners did what they were supposed to do – they used the guidance provided by this Court on the last major issue in these 11-year-old bankruptcies (the income tax issue) to settle the remaining claims so

that the bankruptcies can be concluded before the Millennium.

For their part, the bankruptcy and district court judges have complied in all respects with this Court's opinion in all the proceedings after remand.

Nothing here represents a "usurpation of judicial power" or disregard for this Court's ruling. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953).

The only "usurpation" involved here is the Petitioners' impatience with the appellate process – their appeals from the income tax settlements and rulings are pending in the court of appeals[10] (the cases have been fully briefed and are only awaiting an argument date.) The Petition is merely further evidence of the Petitioners' unceasing refusal to accept prior, final, and adverse adjudications.

At the heart of this Petition is a claim that the bankruptcy court should not have ruled against the Petitioners on the merits after a trial in June, 1993 on the Petitioners' claims against the Trustee and the Bank (Petitioners' App. 18). That ruling was correct, however, and was affirmed in all respects by the district court in January, 1995 (Petitioners' App. 42). The Petitioners appealed the district court order to the court of appeals, but then inexplicably filed the Petitions here before the court of appeals could hear argument or issue an opinion.

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[10] Consolidated cases no. 94-4818 and 95-4212, United States Court of Appeals for the Eleventh Circuit.

The Petition is frivolous and entirely improper; this Court has held squarely that, "the extraordinary writs cannot be used as substitutes for appeals" *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953), *citing Ex Parte Fahey*, 332 U.S. 258, 259-60 (1947).

This Court's Rule 20.1 notes that this Court's discretion to issue a writ of *mandamus* is "sparingly exercised". The Rule requires the Petitioners to prove "exceptional circumstances", and to show that "adequate relief cannot be obtained in any other form or from any other court". The Petitioners have made no such showing. To the contrary, the Petitioners themselves invoked the appeals now pending in the court of appeals, thereby pursuing a perfectly adequate remedy.

## CONCLUSION

For these reasons, the writ should be denied.

Respectfully submitted,

VANCE E. SALTER, ESQ.
COLL DAVIDSON CARTER SMITH
SALTER & BARKETT, P.A.
3200 Miami Center
201 South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 373-5200